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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 466

DEPARTMENT OF BANKING, STATE OF NEBRASKA as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska,

Petitioner,

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the NATIONAL SURETY COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING

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Statement

On June 18, 1942, the Court of Appeals of the State of New York entered final judgment herein and handed down its remittitur. The period of three months provided by statute, 28 U. S. C., Sec. 350, for the filing of an application for a writ of certiorari expired on September 18, 1942. Petitioner filed its application on October 20, 1942.

On July 15, 1942 petitioner, by motion, requested the Court of Appeals to amend its remittitur by adding that a federal question was presented and necessarily passed upon when rendering final judgment. In this respect the motion

was granted on July 29, 1942. Although there was still more than a month and a half in which to timely file a petition for a writ, petitioner allowed this time to expire. A filing was made just before the expiration of a three months period computed from the amendment of the remittitur.

On December 21, 1942 this Court, in a *per curiam* opinion (63 S. Ct. 233), denied the writ "for want of jurisdiction," specifying that the petitioner had failed to file in time and that the motion to amend did not toll the time for filing the application.

Subsequently, petitioner made two motions in the Court of Appeals. Petitioner requested said Court to decree that its motion to amend the remittitur constituted a reargument or a rehearing of the entire appeal. This motion was denied on January 14, 1943. Petitioner then moved to correct the amended remittitur of July 29, 1942 by having said Court itemize, in its order, the papers submitted on the motion to amend. This motion was denied on March 4, 1943.

POINT I

On this application, petitioner, representing the creditors of a closed bank in Nebraska, presents two arguments for granting a rehearing. First, petitioner states that on the original application, neither party raised the question of jurisdiction and that therefore, argument is presented herein for the first time.

Jurisdiction is the "power to entertain the suit, consider the merits and render a binding decision thereon" (*General Investment Co.* v. *New York Central Railroad Co.*, 271 U. S.

228, 230). Whether the parties raised and argued the question of jurisdiction, or whether this Court, on its own initiative, found a lack of jurisdiction is immaterial; the facts, established before the question arose, are the essential determinative factor. This Court found that petitioner failed to file in time. Nothing that petitioner could offer by way of argument could alter this fact. This Court denied the petitioner's application for want of jurisdiction; no amount of argument could confer jurisdiction.

Second, petitioner claims that under a line of cited cases, this Court has heretofore granted rehearings and taken jurisdiction of applications for writs of certiorari and appeals by writs of error, where they were originally denied or remanded because the records did not contain certifications that a federal question had been raised and necessarily passed upon.

The cases cited by petitioner are not in point because in each such case this Court originally had jurisdiction because the applications and the appeals were timely filed. In said cases the applications were dismissed and the appeals were remanded due to the omission in the records, that a federal question had not been certified. When the certifications were added to the records, this Court considered the merits of the applications and appeals. In the case at bar, petitioner's failure to file within the time provided by statute foreclosed this Court from reviewing the original application. Not only was this Court powerless to entertain jurisdiction of the application but the petitioner was equally impotent to remedy the defect.

Petitioner argues that the amendment of the remittitur was a necessary step for the proper presentation of its application (*Lynch* v. *N. Y.*, 293 U. S. 52) and to prevent its dismissal. But petitioner fails to appreciate the distinc-

tion between a jurisdictional defect which, under the statute, cannot be remedied and one where this Court, having proper jurisdiction, but due to an irregularity in the record, has remanded the same in order to have the defect cured. Illustrative of the former is the case at bar and of the latter are the cases cited by petitioner.

CONCLUSION

It is respectfully submitted that the motion herein for a rehearing of the application for a writ of certiorari should be denied in all respects, with costs.

Respectfully submitted,

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J. FRANCIS LYNCH,
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